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No. 88-447

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RODNEY G. VEST

Petitioner

v.

MARIAN SCHAFER and STATE OF ALASKA

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF ALASKA

PETITIONER'S REPLY BRIEF

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November, 1988

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Respondents Marian Schafer and the State of Alaska argue that the petition of Rodney G. Vest and the class which he represents ("Vest") should be not be granted because "no court has ever recognized a damages remedy, as petitioner requests, for the enactment and execution of legislation later found to be unconstitutional."[1] Not only do respondents mischaracterize the authority upon which they rely,[2] they fail

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[1] Brief of Respondents in Opposition, pp. 11-12.

[2] K. Davis, *Administrative Law Treatise*, § 25.00-4 (1982 Supp.)

to direct this Court's attention to the authority raised below which proves this contention to be in error.[3]

In *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982) Florida's highest court considered whether a state statute granting tax preferences based on length of residency violated equal protection guarantees. Relying on this Court's holding in *Zobel v. Williams*, 457 U.S. 55 (1982),[4] the court concluded that the statute lacked a rational basis and awarded a refund of past taxes to those litigants who challenged the statute. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court reversed a federal district court's refusal on eleventh amendment grounds to award damages, in the form of retroactive benefits, for state legislation that violated the equal protection provisions of Title VII of the Civil Rights Act of 1964. The Court affirmed that Congress' determination to make the states answerable for damages in federal courts for the violation of equal protection was consistent with its enforcement powers under the fourteenth amendment.

The question presented by the underlying decision is whether states are subject to constitutionally based damage actions brought in their own courts. Florida has decided in the affirmative. Congress' considered determination to subject the states to such actions in federal courts evidences that there are sound policy underpinnings for the damage remedy which Vest seeks. Contrary to the assertions of the respondents, there is persuasive precedent for Vest's claims.

Respondents cite the findings of the trial court in the proceedings below in support of the contention that the

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[3] Respondents cite authority in the decision raised below which supports their position, but fail to cite contrary authority also addressed therein. *Vest v. Schafer*, 757 P 2d (Alaska, 1988), *App.* p. A15, n. 19.

[4] *Id* at 543-44.

unconstitutionality of the residency provisions of Alaska's Longevity Bonus Act was "not 'clearly established' until the court so ruled in the instant case."[5] Although the trial court did make such a finding, it is entirely without support in the record. The record, in fact, very clearly demonstrates precisely the opposite. Vest expressly challenged this finding on appeal.[6] The Alaska Supreme Court did not affirm the determination of the trial court. Rather, the court held that "a *Bivens*-type action, brought in state court against the State, cannot be allowed to stand when it is grounded on a claim that the legislature enacted a law later found to violate the equal protection clause of the fourteenth amendment of the Constitution."[7] Since a law will always be found to violate the Constitution only after it has been enacted, the apparent unconstitutionality of a statute presents no inhibition to the State's enforcement of it under this holding. Consequently the trial court's unfounded and unperfected determination is not germane to the Court's consideration of this petition.

Respondents also cite portions of the trial court's decision in the proceedings below which assert that Vest created the injury of which he complains by failing to challenge the offending statute at its inception.[8] Not only is the logic of this proposition questionable, but the procedural history of the underlying case evidences, as a practical matter, that it is not correct. This Court decided *Zobel v. Williams*, 457 U.S. 55, on June 14, 1982. *Zobel* established beyond good faith dispute that the residency requirements in Alaska's Longevity Bonus Act were unconstitutional. Vest brought suit on July 6, 1982 challenging these requirements. The State of Alaska kept the offending requirements in place and made millions of dollars in exclusionary payments by litigating in

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5 Brief of Respondents in Opposition, p. 4, n. 2.

6 Appellant's Brief, pp. 35-39.

7 *App.*, pp. A21-22.

8 Brief of Respondents in Opposition, pp. 8-9.

bad faith for almost two more years. The State was not barred from making these payments until April 6, 1984. The class could not have avoided injury for the period of time required to have the law judicially invalidated even if its action had been filed on the day the law was enacted.[9]

Respectfully submitted,

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[9] Although respondents raise other arguments in support of their opposition to Vest's petition, Vest does not believe that they are of sufficient merit to warrant further discussion.